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DMA Response to Ofcom's Statement of Policy on the persistent misuse of an electronic communications network or electronic communications service consultation.

A. INTRODUCTION

The Direct Marketing Association (UK) Ltd (DMA) welcomes the opportunity to respond to Ofcom's consultation on the Statement of policy on the persistent misuse of an electronic communications network or electronic communications service. The DMA has been working with Ofcom on the silent calls issue.

The DMA and its Members

The DMA is Europe's largest trade association in the marketing and communications sector, with over 930 corporate members and positioned in the top 5% of UK trade associations by income. £13.6 billion was estimated to have been spent on direct marketing activity in 2003 (*DMA Census of the Direct Marketing Industry 2003/4*). The DMA represents both advertisers, who market their products using direct marketing techniques, and specialist suppliers of direct marketing services to those advertisers - for example, advertising agencies, outsourced contact centres etc. The DMA also administers the Telephone Preference Service and the Fax Preference Service. On behalf of its membership, the DMA promotes best practice, through its Codes, in order to maintain and enhance consumers' trust and confidence in the direct marketing industry. The Direct Marketing Authority is an independent body that monitors industry compliance.

B. EXECUTIVE SUMMARY

The DMA welcomes many of the proposals contained in the draft statement of policy. The outbound industry will need to make major changes to the way it operates and therefore a six month transitional period is appropriate. However we believe that instead of reducing the abandoned call rate from 5% to 3%, Ofcom should concentrate on greater enforcement action to ensure that companies are complying with the current 5% rate. There are a number of issues surrounding the informational message which need to be clarified with the Information Commissioner's Office. We also have a number of minor technical issues with CLI presentation and the information message. Ofcom should also consider the possibility of a dialler accreditation scheme.





C. RESPONSE TO QUESTIONS.

Q1 Do you agree that consumers are concerned by silent calls and that Ofcom is right to take enforcement action against the companies that make them?

Yes.
Yes.

Q2 Do you agree with Ofcom's proposed approach to taking enforcement action guided by a sense of administrative priority?

Yes. However, Ofcom should concentrate enforcement action on those companies who are persistently and wilfully not complying with the statement of policy, rather than those companies that are genuinely trying to comply with the policy and may occasionally fall short. It would be helpful if OFCOM produced guidance notes and other detailed information to promote a greater understanding of the policy statement, along the lines of the information produced by the Information Commissioner's Office. This is something which the DMA could work with OFCOM on to achieve greater education and understanding across the industry.

Q3 Do you agree that the range of procedures proposed in the statement will be effective in reducing the degree of anxiety, annoyance and inconvenience caused by silent calls?

No, unless Ofcom develops enforcement policy along the lines suggested above in the answer to question 2. Reducing the abandoned call rate from 5% to 3% will not make any noticeable difference to consumers as each adult in the UK would receive on *average* 1.5 fewer silent calls per year. OFCOM should look again at leaving the abandoned call rate at 5%, making the other changes in the draft statement of policy and developing a tougher enforcement policy. Otherwise the DMA believes that if Ofcom announces a change in policy and then the public sees no change, Ofcom and the telemarketing industry will be blamed for raising consumer expectations that the problem of silent calls is being dealt with, when in the eye of consumers it is not as they are still receiving the same amount of silent calls.

Many outbound telemarketing companies are not complying with the current abandoned call rate of 5%, and as a result are gaining a competitive advantage over those telemarketing companies who are complying with the 5% abandoned call rate. Those companies which exceed the 5% abandoned call rate have a better productivity rate. The move to a 3% abandoned call rate will have an adverse impact on small call centres, as larger call centres can achieve greater economies of scale by using predictive-diallers.

Ofcom should embark on an education process to all companies but particularly reminding companies who out source to overseas call centres, that the overseas call centres are subject to the policy statement when carrying out work on behalf of a UK registered company. Otherwise there is a risk that telemarketing companies will out source their activities to an off shore call centre, believing that this is a way round the





abandoned call rate. This will only further damage the global competitiveness of the UK telemarketing industry.

Ofcom also needs to give industry a transitional period of 6 months in which to comply with the new policy statement, in order to be able to balance the cost to industry of complying with public expectations. The telemarketing industry will have to spend significant amounts of money in re-engineering their systems policies and procedures to comply with the new policy statement, and it is unreasonable to expect industry to be able to complete this in less than six months.

Q4 Are there any additional procedures which call centres could adopt to reduce the degree of anxiety, annoyance and inconvenience caused by silent calls.

Yes. The DMA believes that some form of active third party dialler accreditation scheme would be helpful. Dialling statistics could be regularly monitored by an independent outside organisation to ensure that the equipment is operated correctly under the current legal and regulatory regime. This would include ensuring CLI presentation and the content of the information message complies with current guidelines. We would be happy to discuss the details of such an accreditation scheme with Ofcom.

D .SPECIFIC COMMENTS ON THE CONSULTATION PAPER.

Section 4 Identifying when misuse becomes persistent.

4.2 The view that a pattern of behaviour requires a minimum of three instances to be recognised as persistent may lead to one incident being regarded as persistent misuse. For example if a predictive dialler at one call centre was wrongly set one day due to human error and the dialler was being used on three different campaigns, this could be held to be three instances when in fact it was just one instance. Ofcom's enforcement policy needs to be able to distinguish between the above instance and those companies which are persistently and wilfully not complying with the policy. This may lead to enforcement action being taken against larger call centres, rather than smaller call centres because of the greater number of outbound calls which larger call centres are making and hence a greater number of silent calls. However a small call centre that is exceeding the abandoned call rate by a large percentage may in fact be more of a nuisance to consumers. Ofcom's enforcement policy needs to take the above into account.

Section 5 Examples of persistent misuse

Misuse by making silent or abandoned calls

5.16

The informational message is required under the policy statement to offer " the called person the possibility of declining to receive further calls from that company by contacting a no charge (0800) or Special Services basic rate (0845) number."





If the call is made to a mobile number and the called person calls the 0800 or the 0845 number from the mobile number then the call will not be a no charge or Special Services basic rate call, as mobile operators charge normal network tariffs for these types of calls.. This needs to be clarified. The important point is that it cannot be a premium rate number. The Information Commissioner's Office has accepted this point with regard to SMS unsubscribe requests under the Privacy and Electronic Communications (EC Directive) Regulations 2003.

It is unclear what the legal basis is which allows customers to opt-out of receiving further customer service calls from a company in the case of an abandoned call via the informational message. Under the Data Protection Act 1998 consumers have the right to opt-out of receiving direct marketing communications, but this right does not extend to customer service calls. Consumers also need to be made aware that that personal information about them may be divulged through the informational message. It may be helpful to discuss these points further with the Information Commissioner.

Many companies use predictive diallers to make customer service calls. If consumers were to have the right to prevent companies from making customer service calls using predictive diallers, this would impose a large cost burden on such companies and reduce the efficiency of the service which they can provide. In the end consumers would suffer as they would pay higher charges for the service.

It is not clear whether it is acceptable practice for telemarketing companies to interrupt the information message if and when an agent becomes available, and we would welcome clarification on the legality of this under the policy statement

We believe that to retain a level playing field for both UK and offshore based call centres, all calls to UK domestic numbers from any source must comply with these requirements:-

- Offshore companies must provide a CLI with each call. We recognise that issues between certain pairs of networks may mean that CLI can be lost along the way, and that this is outside the control of the call centre, however it would be reasonable to require that a CLI is given when a call is presented to a standard UK BT land line (we believe that BT is the biggest terminating network provider for UK consumers and has robust interconnect agreements with most other operators for the onward transmission on CLI). In cases, where the call is not to a standard UK BT landline, offshore contact centres must make concerted efforts to ensure CLI presentation. In all cases, the information message must be delivered.
- The return call must not be charged at a higher rate than the national call rate. This will require offshore contact centres to have a service terminated on a UK telephone number.

Number – scanning

5.20

Number scanners





The DMA believes that number scanning that causes a 'bell tinkle' in a consumers home is unacceptable and should cease. We believe that any remaining number scanning activity should carry a returnable CLI.

Section 6 Ofcom policy on the issuing of section 128 notifications

Ofcom's priorities on issuing notifications

6.7

Compliant companies which are providing a CLI number are more at risk of enforcement action from Ofcom since consumers will be able to provide Ofcom with a name when they report the complaint to Ofcom. There is a risk that enforcement action will not be taken against companies which are not providing a CLI, unless Ofcom actively works with the telephone network's nuisance call bureaux to identify those who are making abandoned calls above the acceptable rate and are not providing CLI. Ofcom should make a public statement that it will work with the nuisance call bureaux on this point.

Section 7

The consequences of a notification

7.6. In determining the amount of damages, we would expect Ofcom to ensure that the consumers provide proof of damages, that the amount of damages only relates to direct losses, and that there are no punitive damages.

7.7 We would expect Ofcom to ensure that the legal principle of foreseeability is used in the case of individual susceptibility.

E. CONCLUSION

The DMA looks forward to receiving a copy of the final version of the policy statement with the accompanying guidance notes. The DMA would be happy to discuss with Ofcom officials responsible for this consultation paper any points made in this response.





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